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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 133.

JAMES F. MASTERSON, MICHAEL STELLA, EVA LEFKER and OTIS & COMPANY,

Petitioners,

v.

JEROME R. PERGAMENT and GEORGE J. LONDON, *et al.*, JOSEPH W. FRAZER and HENRY J. KAISER, *et al.*,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS.

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INDEX.

PAGE

POINT I—The majority below held that, under Rule 23(c) F. R. C. P., fraud in the making of the settlement is no bar to its approval 2

The Opinion of the Court of Appeals 2
The District Court Proceedings and Opinion 7

POINT II—This Court should review the erroneous precedent established by the ruling of the majority below that fraud in the bargaining is immaterial, even though it considers that the decision may also have rested on the alternative ground that there was no such fraud 10

TABLE OF CASES CITED:

American Mutual Life Insurance Company v. *Avon Park*, 311 U. S. 138 9

Armstrong Paint & Varnish Works v. *Nu-Enamel Company*, 305 U. S. 315 12

Florida Central R. R. Co. v. *Schutte*, 103 U. S. 118... 11n

Geddes v. *Anaconda Copper Mining Company*, 254 U. S. 590 9

Hurn v. *Oursler*, 289 U. S. 238 11

Pepper v. *Litton*, 308 U. S. 295 9

United States of America v. *Title Insurance & Trust Company*, 265 U. S. 472 10

United States v. *United States Gypsum Co.*, 333 U. S. 364 12

Woods v. *Interstate Realty Company*, 337 U. S. 535, 10, 11, 11n

OTHER AUTHORITIES CITED:

Federal Rules of Civil Procedure:
Rule 23 7
Rule 23(c) 2, 4, 5

Webster's New International, Second Edition, 1947.. 8n

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REPLY BRIEF ON BEHALF OF PETITIONERS.

Respondents take two positions:

(1) They do not deny that if the Court of Appeals held on the question of fraud in the making of the settlement as petitioners say, the holding should be reviewed by this Court, and they even imply that there would have to be a reversal (Kaiser, pp. 6, 12-13; Pergament, pp. 6-7*). Respondents simply deny that the Court of Appeals so held. They argue that all the majority did was to affirm an alleged finding by the District Judge that the fraud was not committed.

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* Unless otherwise indicated "fraud" is herein used in the sense of unfairness and other constructive fraud, which is the type of fraud which Judge Allen found to exist (9-4745). The brief of Joseph W. Frazer, Henry J. Kaiser, *et al.* is cited as "Kaiser"; the brief of Pergament and London is cited as "Pergament".

(2) At the same time, however, the Kaiser brief recognizes that the Court of Appeals *did* make the holding which petitioners are seeking to get reviewed, and the brief argues in support of such holding. At page 14 it is stated that "the Court of Appeals correctly recognized the role of the District Judge under Rule 23 (c)" and that "the power resided in the court, not the stockholder plaintiffs, to compromise the rights of the corporation"; hence there is nothing wrong in the fact "that under the reasoning of the court below, the District Judge becomes the sole representative of the corporation whose decision is final."

Respondents base their first position solely on quotation, out of context, of one sentence from the majority opinion of the Court of Appeals, and seek to buttress it by inaccurate statement of the holding of the District Court, and by incomplete quotations from its opinion. The second position, not advanced as an alternative, obviously cancels out the first, and leaves for decision the question whether this Court should review the holding below or let it stand as precedent.

POINT I.

The majority below held that, under Rule 23(c) F. R. C. P., fraud in the making of the settlement is no bar to its approval.

The Opinion of the Court of Appeals:

As shown by the majority opinion, Judge Allen's opinion was originally prepared for the Court—whether the unanimous Court or a majority is not stated (R. 9-4756). The result, contrary to the usual

procedure, was that where there was unanimity the majority established it by agreeing with, or not differing from, what is now the dissent, and where there was difference the majority stated it in terms of departure from the dissent.

This is important, because on the point now of interest—fraud in the *factum* of the settlement—*the only facts set out in either opinion are those recited by Judge Allen, and the majority did not disagree with them or with her legal conclusion that they constituted fraud.* Judge Allen also pointed out that these facts were, respectively, "admitted" (R. 9-4740), "admittedly" so (9-4741, 4742), "undisputed" (9-4742), and "conceded" (9-4743); and the majority did not differ as to this either. The majority position was that the facts stated and the conclusions drawn by Judge Allen on the question of fraud could be accepted as correct but were immaterial.

This appears practically at the outset of the majority opinion by necessary implication, and a little later by direct statement.

At the outset, after stating certain general points of agreement with Judge Allen, the majority said (R. 9-4756):

> "It has always been our view however that the principle governing responsibility for inequitable or illegal conduct is not to be applied in a vacuum but that those who complain of it must show *that they were injured thereby* (citing cases). This leads us to the view that the *crucial question* in this derivative suit is whether the settlement arrived at between representatives of the stockholders and the corporate and individual defend-

ants was, at the time and under the circumstances in which it was arrived at and considered by the district court, *for the best interests* of the Kaiser-Frazer Company. The district judge after thirteen weeks of trial and meticulous consideration of the evidence *so held* and, under familiar rules, we are not permitted to set aside his findings unless they are clearly wrong." (Emphasis supplied above and hereafter unless stated to the contrary.)

Judge Allen, in her opinion from which the majority was expressing dissent, had set out in great detail the fraud in the bargaining, and the majority did not disagree. It is everywhere conceded that, Rule 23(c) aside, fraud in the bargaining is fatal even without proof of injury; and of course the majority knew that the petitioners were contending that the result was the same under Rule 23(c), and that Judge Allen agreed with them. Hence, the requirement that petitioners must show injury if they are to complain, plus the insistence, notwithstanding the undisputed facts as to fraud, that the "crucial question" was nevertheless whether the settlement was "for the best interests" of Kaiser-Frazer, makes it plain at the outset that the majority thought that fraud in the bargaining was immaterial when the bargain had to be approved by the District Court under Rule 23(c).

This is confirmed by the majority's direct statement of immateriality. After discussion not here pertinent, appears the following paragraph, in which respondents ignore everything except the last sentence (R. 9-4658):

"We are not to be led into a discussion of the many contentions urged upon the court to the

> effect that the negotiators of the settlement on behalf of the corporation were not fully informed; that material information was concealed from them; that the lawyers participating occupied a dual role; or that there was no arm's length bargaining. The settlement agreement did not, and could not, become effective without the approval of the court under the mandate of Rule 23 (c). The District Judge was, therefore, a third party to the compromise. There is no contention, and there could be none, that in approving the compromise important information was concealed from him or that his participation in the settlement was subject to any infirmity. Every possible aspect of opposition was fully by him explored. In any event, he ruled against the objectors upon these matters upon the consideration of substantial evidence and in the exercise of a sound judicial discretion."

Respondents would have it that in the words "these matters" the majority were referring to petitioners' charges of fraud in the negotiations. This is untenable. The paragraph must be read as a whole. The first sentence dismisses the charges of fraud as requiring no discussion. The rest of the paragraph explains *why* this is so. The reason given is, that in view of the position of the District Judge under Rule 23(c), full and frank disclosure to him of the facts bearing upon the merits of the settlement cures any prior non-disclosure or suppression; and such disclosure having been made to the District Judge, so that he had all the important information and "every possible aspect of opposition was fully by him explored," there is no further ground of complaint on this score. The concluding sentence follows logi-

cally from what went before. What it says is, that the District Judge having found upon substantial evidence that the settlement was for the best interests of the corporation, he ruled in the exercise of a sound judicial discretion that it should be approved.

On the respondents' interpretation, the last sentence not only has nothing to do with what precedes it in the same paragraph, but actually negates everything that precedes it. On this interpretation, we have the majority first saying emphatically that they will *not* be led into discussion of the fraud issue, then explaining fully *why* not, but nevertheless in the end reversing themselves, and reviewing and ruling upon the very matter which they had said at the outset they would not go into. This is not interpretation, but distortion.

Furthermore, the respondents' interpretation would have the majority saying that the proof as to fraud in the negotiations had been "fully explored" by the District Judge, and that he had found on this issue "upon substantial evidence." However, the record shows conclusively, *first,* that the petitioners were repeatedly and emphatically shut off from making their proof as to fraud, on the precise ground that the District Judge considered the subject immaterial; *secondly,* that there was no substantial evidence to controvert the facts as to fraud which are set out in Judge Allen's opinion. The majority could not possibly have intended to say what the respondents would have them saying. The following brief consideration of what happened in the District Court demonstrates this.

The District Court Proceedings and Opinion:

(1) The District Judge repeatedly refused to take the petitioners' evidence as to fraud (*e.g.*, 7-3819, 3835, 3845, 3863, 3908, 3953, 3956, 3963-5), basing his refusal on the precise ground that the issue was immaterial. For example, at p. 7-3961 the court said: "All right, but it is immaterial. The question now is, 'Is this a fair settlement in view of the information that you have now?' That is all there is to it. * * *" At p. 3962, in the same context, the court said again "The question is 'Is this a fair settlement?' Not how smart the attorneys (for the settling stockholders) were, or how much they knew"; and at p. 3965: "And it is immaterial what information they had." So strictly were petitioners limited in this regard, that at one point they had to resort to an offer of proof, to which objection was once again sustained on the ground of immateriality (R. 7-3963-5). It is imputing unfairness to the District Judge—and certainly confessing reversible error—to say that he made a finding of fact on a matter as to which, on the ground of immateriality, he refused to take a large part of the proffered proof.

(2) The District Judge gave two reasons for the ruling of immateriality. The first (the alleged special powers conferred by Rule 23) requires no further discussion. The second was his refusal to recognize that the settling stockholders were fiduciaries (R. 7-3966). He would go no further than to say, in effect, that if petitioners could make a case of common-law fraud, he would listen, but such things merely as non-disclosures and suppressions were of no moment. Immediately following his ruling (R. 7-3849) that he could not entertain evidence as to

whether or not "everything was aired" in the negotiations, he said: "If you can find any phenagling,* all right, but I will rule on the questions as you ask them;" and he ruled as already indicated.

In short, it was only despite the court's expressed attitude, and only by virtue of occasional and infrequent relaxations from it, that petitioners succeeded in getting into the record the uncontradicted evidence as to fraud which is set out in Judge Allen's opinion. Accordingly, it would have been extraordinary for the District Judge to have found, as argued by the respondents, that there was no fraud in the bargaining. This would have involved not only error in ignoring the undisputed evidence that did get into the record, but also unfair treatment of petitioners in refusing to admit additional evidence of such concealment because it was immaterial and then finding against petitioners on the issue.

The District Judge did not so find. He merely refused to make findings on the issue.

On the charge of concealment the District Judge said at R. 1-240 that "the important thing is that this Court—*while not admitting there was any such concealment*—now has the facts." And at 1-242 he repeated his negative holding "But here we do not find any collusion, fraud, concealment or unfair deal-

* To "phenagle," more commonly spelled "finagle," means, among other things, "to cheat" (Webster's New International, Second Edition, 1947), of which, in turn, the first meaning in Webster's is "to deprive of something valuable by use of deceit; to practise fraud upon; to defraud; swindle; as *to cheat* a man out of his savings." This, we believe, is the common use of "finagle" and what the learned Court evidently meant was that misconduct not arising to that degree would not be, in his view, adequate grounds for attacking the bargain.

ing in arriving at the compromise." This statement is immediately followed by the affirmative holding "and we hold that there was 'arm's length' bargaining."

The refusal to find concealment parallels the Court's earlier refusal to find on the same subject, "while not admitting that there was any such concealment." The positive finding of arm's length bargaining parallels the earlier positive finding on the same subject—"and we naturally believe defendants were trying to get as favorable an agreement as they could. On the other hand, plaintiffs were trying to drive as good a bargain as they could."

Since the burden of proof on the issue of fairness in the negotiations was on respondents (*Pepper* v. *Litton,* 308 U. S. 295, 306; *Geddes* v. *Anaconda Copper Mining Company,* 254 U. S. 590, 599; *American Mutual Life Insurance Company* v. *Avon Park,* 311 U. S. 138, 145, 146), failure to find on this issue is equivalent to a finding by the District Court in favor of petitioners.

Accordingly, what happened in the District Court makes plain that respondents have misconstrued the statement in the majority opinion that the District Judge "ruled against the objectors upon *these matters* upon the consideration of *substantial evidence* and in the exercise of *a sound judicial discretion.*" The words "these matters" refer back to the immediately preceding statement, that "every aspect of opposition was fully by him explored." However, fraud in the negotiations as an aspect of opposition was *not* fully explored by the District Judge; on the contrary, he constantly belittled it as immaterial, ad-

mitted a part of the evidence only grudgingly, and excluded the rest. Additionally, "these matters" *cannot* refer to the issue of fraud, because that was not an issue which the District Judge decided against petitioners "upon the consideration of substantial evidence." Finally, a finding as to whether there was fraud or not, *could not* be the subject of an "exercise of a sound judicial discretion;" findings of fact are not matters of discretion. The construction which the respondents seek to put upon this sentence is plainly impossible.

POINT II.

This Court should review the erroneous precedent established by the ruling of the majority below that fraud in the bargaining is immaterial, even though it considers that the decision may also have rested on the alternative ground that there was no such fraud.

Respondents cannot escape the fact that the majority of the Court of Appeals held that fraud in the bargaining was immaterial. The best they can hope is to persuade this Court that the majority ruled, in addition, that there was no fraud in the bargaining. On this assumption the opinion and decision fall within the rule that "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is *obiter* but each is the judgment of the court and of equal validity with the other.' " [Citing cases.] *United States of America* v. *Title Insurance & Trust Company,* 265 U. S. 472, 486. See also, *Woods* v. *Interstate Realty Company,* 337 U. S. 535,

537.* Accordingly, the ruling as to the law, which we seek to have reviewed, now stands as precedent, and the case at bar is one for review if this Court deems the question presented to be of sufficient importance. *Hurn* v. *Oursler,* 289 U. S. 238.

In the *Hurn* case, plaintiff sued for violation of copyright and unfair competition. Both claims were based upon a single alleged wrong, defendant's appropriation of certain ideas and situations in plaintiff's play. The District Court found that there was no infringement of copyright, gave judgment on the merits for defendant on this claim, and dismissed the claim of unfair competition for want of jurisdiction, there being no diversity of citizenship. The Court of Appeals affirmed *per curiam* on the authority of cases cited. This Court granted certiorari, and said (p. 240):

> "While, as presently will appear, the claim of unfair competition is without merit and the dismissal must stand in any event, it is important that if the determination of the court was put upon the wrong ground we should so declare, that it may not be followed as a precedent."

The Court then decided that the decision below was wrong in dismissing for want of jurisdiction the claim of unfair competition, because jurisdiction of the federal claim based upon violation of copyright gave the court jurisdiction to determine common law rights based upon identical facts. Further finding that these

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* Even the fact that the case was finally disposed of upon one ground does not relegate the other to the category of dicta, so long as this other ground was presented on the record and passed upon by the court. *Florida Central R. R. Co.* v. *Schutte,* 103 U. S. 118, 143.

facts also required dismissal of the unfair competition claim, this Court affirmed upon the merits.

The briefs on the application for certiorari reveal that the respondent Brentano strenuously opposed review on the ground that the claim of unfair competition had been eliminated by the finding of no infringement, which was not sought to be reviewed (Point I). Under Point II he argued that the allowance of this appeal would permit the raising of a purely abstract question; that the only facts alleged in the complaint bearing upon the question of unfair competition had been forever eliminated by the finding of no infringement; and that it was therefore apparent that requiring the consideration by the trial court of an alleged claim of unfair competition would be a useless formality. Other respondents made similar arguments. Even after the grant of certiorari the Brentano brief continued to argue that "the purpose of a decision on appeal is to apply the rules which govern the facts of the particular case being considered, not to lay down dicta which may affect any other cases." Nevertheless, this Court (1) granted certiorari, (2) did not dismiss the writ as improvidently granted, and (3) considered and decided the point presented.

Subsequent decisions of this Court are in accord. *Armstrong Paint & Varnish Works* v. *Nu-Enamel Company*, 305 U. S. 315, 324, fn. 6; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 387.

Accordingly, even if this Court accepts respondents' argument that the decision below may be supported on factual grounds, the case still merits review be-

cause of the important and erroneous legal precedent that the Court of Appeals undeniably laid down as a basis for its decision.

Respectfully submitted,

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TABLE OF CASES.

	PAGE
Armstrong Paint & Varnish Works v. *Nu-Enamel Company*, 305 U. S. 315	6
General Talking Picture Corporation v. *Western Electric Company*, 304 U. S. 175	6
Hurn v. *Oursler*, 289 U. S. 238	6
United States v. *United States Gypsum Co.*, 335 U. S. 364	6
Williams v. *First National Bank*, 216 U. S. 582, 595	3

STATUTE.

Revised Rules of the Supreme Court, Rule 38(5)	6

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Petitioners in their Reply Brief (pp. 1, 2) take upon themselves to state Respondents' position and from our refusal to be drawn into argument of the merits of the non-existent legal question on which they seek certiorari deduce our concurrence in their views concerning the same. Such is not the fact. We neither admit that *if* there is fraud, there is a reviewable question, nor do we imply there would have to be a reversal *if* there were fraud in the negotiations. No such question is presented on this record. Petitioners'

question is purely hypothetical. The fact is that both lower courts found there was no collusion, fraud, concealment or unfair dealing in arriving at the compromise and that there was "arm's-length bargaining". In the light of that express finding, based on the oral testimony of all parties to the negotiations, it is clear that there is no question presented for review by this Court.

Petitioners' Reply Brief is based upon their false premise that the District Court held that the alleged fraud in the negotiations was immaterial and their belated and equally false assertion *(now made for the first time and clearly beyond the scope of the sole issue presented in their Petition for certiorari)* that "the District Judge repeatedly refused to take the Petitioners' evidence as to fraud" (Reply Brief, p. 7). Actually the District Judge throughout the hearings repeatedly ruled that evidence tending to show fraud, collusion, concealment or non-disclosure was admissible.[1] Despite Petitioners' threats and promises and despite the latitude given them by the District Judge, such evidence never did appear (R. 7-3853). The record references which Petitioners cite in support of their statements relate in each case to their lengthy cross-examination of the attorneys who negotiated the settlement, which occupies some 500 pages of the record (R. 3-699-1045, 7-3802-3975). A review of this testimony reveals that Petitioners were repeatedly permitted to go beyond all normal bounds and were never precluded from any examination the object of which was to determine whether there was suppression, concealment or non-disclosure of facts or any fraud, col-

[1] e. g., the District Court said (R. 7-3902-3): "• • • there is also the possibility in these suits of collusion; and if there is any (705) collusion in the settlement, the Court will not approve of any settlement. If, either directly or indirectly, they can show collusion, they have the right to, or if they can show a false reason, they have that right. • • •"

lusion or unfair dealing. The few rulings against Petitioners involved improper questions. Petitioners acknowledged that there was no evidence of "conscious wrongdoing" or "dishonesty" on the part of the negotiators (R. 7-3848-3905). Reduced to its lowest terms their sole complaint is that stockholders' attorneys at the time of negotiations did not have the composite knowledge which all attorneys and the Court developed during thirteen weeks of trial, which Petitioners say disqualified them as proper negotiators. The absurdity of this position the District Court quickly recognized.[2] Such a requirement would render settlements a practical impossibility,[3] and set up an insurmountable barrier to peaceful settlements which are universally favored by the courts. *Williams* v. *First National Bank*, 216 U. S. 582, 595. No serious claim can be made that stockholders' attorneys did not have adequate knowledge of the litigation as their presentation and testimony clearly indicates (R. 2-311-463, 7-3942-3975), a fact that was recognized by the Court (R. 7-3848).

The statements of the District Judge quoted out of context on page 7 of Petitioners' brief did not, as is made to appear, involve exclusion of any evidence bearing on fraud as Petitioners assert. Those statements were solely and correctly upon the proposition that if the court should find upon all the evidence that the settlement was for the best interests of the Corporation and its stockholders it would be absurd to refuse to approve it because the nego-

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[2] (R. 7-3954) where the Court said: "Why, gentlemen, no, no. They did not have to know all the possibilities, especially the possibilities that have developed as a result of ten or eleven weeks of a lawsuit."

[3] (R. 7-3950) where the Court said: "• • • I know this, that in a suit of this size, no one attorney could know all the possible exhibits and ramifications, and undoubtedly since this case has started, attorneys on both sides have learned a lot about the other side's position in the case."

tiators did not know some detail of the evidence which would not materially affect the result.

The District Judge recognized that fraud or collusion in the settlement was one of the issues before him and that if either were established he would not approve the settlement (R. 7-3849, 3903, 3906, 3946). After the hearings exhaustive briefs were submitted, devoted in part to Petitioners' claims of fraud and collusion. Thereafter, the District Judge found in his opinion that there was no collusion, fraud, concealment or unfair dealing and that there was "arm's-length bargaining" (R. 1-242). Further, so that there might be no possible misunderstanding, the District Court in its Order Approving the Compromise expressly stated "* * * that said agreement of settlement and compromise was arrived at fairly and in good faith * * *" (R. 1-291). It is therefore idle for the Petitioners to argue that the District Judge made no such finding, gave no consideration to the question, and held it to be immaterial.

Petitioners' construction of the Court of Appeals' opinion is erroneous. They indulge in the unwarranted assumption that Judge Allen's dissent was originally that of the majority, who later changed their minds and decided for affirmance. It appears more probable that Judge Allen was originally designated to write a unanimous opinion for affirmance and then changed her mind. In any event such speculation does nothing to further Petitioners' argument. The fact is that there was one controlling opinion and decision of the Court of Appeals—that of the majority.

The statement by Petitioners that the majority of the Court did not disagree with Judge Allen as to fraud in the negotiations is without basis in fact. The majority expressly enumerated those matters of fact and propositions

of law recited in the dissenting opinion with which they were in agreement (R. 9-4756).[4] They did not include Petitioners' allegations with respect to the adequacy of the notice and their numerous contentions relating to fraud. Everything which follows in the majority opinion is contrary to the findings of the dissenting Judge. The majority separately considered the adequacy of the notice to stockholders (R. 4757), the *alleged improprieties* in the settlement negotiations (R. 9-4758), the probabilities of recovery on the various causes of action (R. 9-4759), the adequacy of the consideration (R. 9-4767-4769), and the soundness of the judicial discretion exercised by the District Judge (R. 9-4758, 4770). The Court rejected Petitioners' contentions as did the District Court.

Petitioners under the heading "Point II", seek to broaden their petition for certiorari by urging that:

> "Accordingly, even if this Court accepts respondents' argument that the decision below may be supported on factual grounds, the case still merits review because of the important and erroneous legal precedent that the Court of Appeals undeniably laid down as a basis for its decision." (Concluding paragraph of Petitioners' Reply Brief, pages 12-13.)

The quoted language is important for its tacit admission that the decision below may be supported on factual grounds, because Petitioners' alleged basis for certiorari

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[4] "It becomes unnecessary, however, to review much of what has been said therein as to the origin of the litigation, the relationship of the parties and the circumstances not controverted in the various transactions here challenged as being violations of a fiduciary obligation of the directors of Kaiser-Frazer Corporation to its stockholders. Nor have we any quarrel with its statement of law which requires meticulous scrutiny of transactions between corporations having over-reaching boards of directors and executive officers" (R. 9-5756).

cannot be broadened by a supporting brief and, *a fortiori*, by a reply brief:

General Talking Picture Corporation v. *Western Electric Company*, 304 U. S. 175:

> "Whether included in the petition or separately presented, the supporting brief is not a part of the petition, at least for the purpose of stating the questions on which review is sought."

However, the proposition that this Court should grant certiorari merely to affirm a right result reached below for several reasons one of which is claimed to be capable of erroneous interpretation (by those interested in so doing) is so contrary to the basic concepts of appellate jurisdiction and of certiorari as to carry its own refutation regardless of how suggested.

The cases* cited and quoted from by Petitioners at pages 11 and 12 of their Reply Brief are not in point. This Court's policy concerning review by certiorari has been carefully promulgated in its Rule 38, Section 5. It is sufficient to say that such review is, as it must be, sparingly granted and is not extended as an invitation to tilt with windmills.

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* *Hurn* v. *Oursler*, 289 U. S. 238, and *Armstrong Paint & Varnish Works* v. *Nu-Enamel Company*, 305 U. S. 315, do not touch upon this Court's policy concerning granting of certiorari but are opinions on the merits and express caveats regarding the scope of the affirmance.

United States v. *United States Gypsum Co.*, 333 U. S. 364, involved a direct appeal to this Court.

We submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents, Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, Hickman Price, Jr., and Kaiser-Frazer Corporation.

HAROLD J. GALLAGHER,
Counsel for Respondent, Kaiser-Frazer Corporation.

BUTZEL, EAMAN, LONG, GUST & KENNEDY,
WILLKIE OWEN FARR GALLAGHER & WALTON,
Of Counsel.

JUL 29 1953
HAROLD B. WILLEY, C

In the Supreme Court of the United States

OCTOBER TERM, 1953.

No. 133.

JAMES F. MASTERSON, MICHAEL STELLA, EVA LEFKER and OTIS & COMPANY,

Petitioners,

v.

JEROME R. PERGAMENT and GEORGE J. LONDON, *et al.*, JOSEPH W. FRAZER and HENRY J. KAISER, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF.

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Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF.

The Kaiser-Frazer Stockholders Protective Committee respectfully applies to this Court for leave to file a brief as an *amicus curiae* in the above entitled action, and submits that it satisfies the requirements respecting eligibility of such leave provided in amended paragraph 9 of Rule 27 of this Court's Rules, on the following grounds:

1. QUESTION PRESENTED.

The above entitled action arises out of a petition filed by respondents Pergament and London in the Federal District Court for the Eastern District of Michigan, Southern Division, seeking approval of a compromise settlement, pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, which they had reached in a stockholder's derivative action filed on behalf of Kaiser-Frazer Corporation against respondents Kaiser, Frazer *et al.*

The settlement involved the release of various causes of action against these same defendants which were the subject of various derivative actions in other jurisdictions wherein Petitioners Masterson, Stella, Lefker and Otis and Company were the plaintiffs. The petitioners objected to the compromise but it was approved by Judge Picard in the District Court and this approval was upheld by the majority of the Court of Appeals for the Sixth Circuit on the grounds that consideration given in the settlement was adequate even though it was fraudulently conceived.

Petitioners have filed a Petition for Writ of Certiorari with this Court raising the issue of whether or not a settlement, fraudulent in its conception, can be approved by the District Courts under any circumstances. Movant is seeking permission to file a brief in support of this Petition.

2. INTEREST OF THE KAISER-FRAZER STOCKHOLDERS PROTECTIVE COMMITTEE.

The Kaiser-Frazer Stockholders Protective Committee was organized in 1948 and has as its purpose to foster and protect the interests of the thousands of small shareholders in Kaiser-Frazer Corporation. The Committee has been active at all shareholders meetings of the corporation, it has sponsored resolutions, it has sought information from management regarding various matters and it has advised and counseled shareholders throughout the country.

The membership of the Committee consists of shareholders holding up to 10,000 shares of stock in the corporation. Furthermore the committee has, when the occasion arose, been the authorized representative of shareholders holding over 700,000 shares of stock in the corporation, which is a substantial portion of the independent shareholders of Kaiser-Frazer.

The compromise settlement involved in this proceeding was naturally a matter of considerable concern to a group organized as the Kaiser-Frazer Stockholders Protective Committee to preserve the interests of minority shareholders. The Committee studied the compromise carefully and came to the conclusion that the considerations which it contained were wholly inadequate to compensate for the corporate rights being surrendered. Thereafter the Committee closely followed the proceedings in the District Court but it did not actively participate since the interests of the corporation and its shareholders were seemingly being fully protected by the objecting shareholders, who are the petitioners in the above entitled proceedings.

The committee did not seek to intervene in the District Court because it did not know that the settlement had been fraudulently obtained and quite reasonably assumed good faith in the consummation of the settlement. Certainly nothing in the notice to the shareholders regarding the settlement indicated that it had been secured by fraud. Indeed, would not such notice have been most remarkable had it stated in effect (which it did not): "This settlement was obtained by fraud but the Court thinks it is all right anyway"? Suffice it to say if the fact that this settlement was obtained by fraud had been known to this committee we would have intervened and undertaken to safeguard the shareholders' interest.

When this case reached the Circuit Court the Committee felt that for two reasons, it should intervene. First because Judge Picard had admittedly based his decision in part on the fact that no other group of shareholders had come forth to protest the compromise, and second because the Committee felt that certain points of interest